eschewing reciprocity, policy makers seeking to reform section 310(b) prefer a service-by-service bilateral policy of reciprocal market access over a unilateral policy of unrestricted foreign investment in American radio licensees. The actual implementation of such a reciprocity rule would still encounter several practical complications that would make the approach intractable and therefore inefficacious.

The asymmetry of regulatory institutions across countries would frustrate the comparisons that would be necessary to determine whether a foreign country had offered U.S. investors reciprocal market access. In the U.S., entry into telecommunications markets is regulated by the FCC, by the state public utilities commissions, by municipalities in the case of cable television franchising, and by the U.S. District Court in Washington, D.C. by virtue of its jurisdiction over the Modification of Final Judgment. These multiple layers of regulation may have no counterparts in a foreign country whose citizens seek to invest in American radio licensees. Furthermore, it would be regrettable if other nations were pressured by the U.S. to imitate the way in which the U.S. has categorized telecommunications services by their regulatory treatment, for the principal effect of that regulatory pigeonholing has been to allocate markets and suppress competition to the detriment of consumers.[120] In short, the unfortunate oddities of U.S. telecommunications law that have accreted since 1927 imply that a reciprocity analysis for section 310(b) would result in the comparison of apples to oranges.

A related, and more serious, problem is that the domestic experience in the U.S. gives no basis for optimism that bilateralism would produce mutually advantageous reductions in the barriers to foreign investment in telecommunications.

120. *See, e.g.*, Robert W. Crandall & J. Gregory Sidak, *Competition and Regulatory Policies for Interactive Broadband Networks*, 68 S. CAL. L. REV. 1203 (1995); J. Gregory Sidak, *Telecommunications in Jericho*, 81 CAL. L. REV. 1209, 1227–34 (1993).

For years, the Regional Bell Operating Companies and the interexchange carriers (principally AT&T, MCI, and Sprint) have been unable to agree on legislation that would simultaneously lift the interLATA restriction in the MFJ while eliminating barriers to entry into local exchange and intraLATA toll markets. Similarly, local exchange carriers have resisted the entry of cable television companies into telephony, and cable has resisted the entry of telephone companies into video. The enactment of major telecommunications legislation in 1995 would be truly extraordinary in light of the repeated inability of previous Congresses to pass such a bill. These experiences testify to the failure of bilateral schemes to reduce entry barriers in domestic telecommunications markets. When bilateralism is taken to the international scale, the additional considerations of culture, language, and nationalism would reduce further the likelihood that reciprocity would successfully reduce restrictions on American firms seeking to invest in foreign telecommunications markets.

Finally, even a relatively simple reciprocity test for section 310(b) would lend itself to strategic use of the regulatory process by incumbent firms. Foreign direct investment by BT makes MCI a stronger competitor against other carriers, which already are able to oppose this form of market entry by urging the FCC not to waive section 310(b) or to issue a declaratory ruling that the investment complies with that statute. When that regulatory approval process must also consider whether reciprocal market access exists on a service-by-service basis in each of the foreign carrier's "primary markets," foreign direct investment by a prominent overseas carrier becomes more costly and risky. Lawyers for the domestic carriers opposing the investment could easily elevate the factual complexity of the proceeding by disputing the characterization of the regulatory environment for telecommunications in each of the investor's "primary markets." Economists would be necessary to opine on what is the "market" to which access is or is not reciprocally offered. Each expert's direct testimony would necessitate another expert's rebuttal testimony. Much like the securities or antitrust litigation precipitated by a hostile tender offer,[121] the reciprocity litigation before the FCC would be high-stakes posturing in which the substance of the legal and economic arguments made would be incidental to the question of greatest relevance to the public interest: Will a market serving U.S. consumers be subjected to greater competition and innovation through the entry of a major foreign carrier making a direct investment?

The Second-Best Solution

We have considered the uncompromising case against bilateral reciprocity. But, within the set of politically feasible alternatives, which statutory provision concerning foreign ownership would pose the least risk to consumer welfare? Stated differently, how should the House and Senate conferees fashion a compromise foreign ownership statute that represents the second-best solution?

The starting place clearly is the House version of proposed section 310(f). That provision, however, should incorporate language from the Senate bill to give the FCC the authority to approve foreign investment on a bilateral basis while awaiting the outcome of multilateral trade negotiations. Whether or not the House language as passed would increase foreign investment in the United States depends critically on the policies of the sitting President and his U.S. Trade Representative. Depending on the President, the FCC may be more or less open to foreign direct investment than are the President and the USTR. It would be naive to presume that the President will always be more inclined to free trade than the FCC, and that the House version of section 310(f) therefore need

121. *See, e.g.*, J. Gregory Sidak, *Antitrust Preliminary Injunctions in Hostile Tender Offers*, 30 KAN. L. REV. 491 (1982).

not grant the FCC approval powers apart from those which the President could effectively supersede by intervening on day 179 of a 180-day pleading cycle.

In addition, the compromise bill would benefit from adding to the language of the House bill the following provision contained in section 310(f)(1) of the Senate bill: "While determining whether such opportunities are equivalent on that basis, the Commission shall also conduct an evaluation of opportunities for access to all segments of the telecommunications market of the applicant." Again, one must read this provision without imputing to it one's own predilection for or against unrestricted foreign direct investment. A free trader, for example, might jump to the conclusion that this passage from the Senate bill would be used as a vehicle by which domestic incumbents could raise the cost and complexity of FCC proceedings for the purpose of slowing or deterring entry by foreign carriers. On closer inspection, however, it appears that such strategic use of the regulatory process might actually be more likely to occur in the absence of an overall evaluation of the openness of the foreign investor's home market. For example, the United Kingdom in general has a very open market to foreign investment, and that fact should not be ignored by the FCC when considering whether some specific segment of that market is as open to foreign investment in the United Kingdom as it is in the United States. In short, the House and Senate conferees should write the law to grant as much latitude as possible to the President and the FCC to allow foreign investment that is likely to enhance economic welfare in the United States.

Conclusion

The FCC's 1995 proposal for bilateral reciprocity based on a "primary markets" test would not increase foreign market access for U.S. firms relative to the status quo. If anything, the proposal would encourage other governments to retaliate with equally overbearing attempts to regulate the foreign direct investments of U.S. telecommunications firms. Neither the domestic nor foreign consequences of such a rule would serve the public interest of American consumers and producers.

Only slightly better results would obtain if Congress were to impose a bilateral reciprocity standard on section 310(b)(4), as S. 652 envisions. If outright repeal of section 310(b) is politically infeasible—and experience during consideration of H.R. 1555 suggests that it is—then Congress could achieve the greatest success in opening foreign telecommunications markets to direct investment by U.S. firms by adopting the Oxley Amendment in its amended form, which the House passed on August 4, 1995 as part of H.R. 1555—subject, however, to the inclusion of the key language from the Senate bill just discussed.

Thereafter, those whose enforce that new foreign ownership provision should heed Jagdish Bhagwati's renewed warning in 1995 concerning what he calls the "unhealthy obsession with reciprocity" in U.S. trade policy: "Especially in industries such as finance and telecommunications, only openness and deregulation can create enduring competitiveness."[122]

122. Jagdish Bhagwati, *An Unhealthy Obsession with Reciprocity*, FIN'L TIMES, Aug. 24, 1995.

8

8

Free Speech

THE RESTRICTIONS on foreign ownership in the Communications Act of 1934 limit the ability of aliens to speak to Americans and the ability of American citizens to hear aliens. Do those restrictions violate the freedom of speech guaranteed by the First Amendment? Of course not, says the FCC.

In 1987, Seven Hills Television, a Spanish-language broadcaster in the Southwest that had a wealthy Mexican investor, argued that section 310(b)(3) "not only limits the class of persons who are entitled to express their views in this country," but also "abridges the public's right to receive information, commentary, and ideas."[1] The statute "restricts rather than promotes freedom of speech" and, "unless correctly construed," violates the First Amendment.[2] The FCC's

1. Seven Hills Television Co., 2 F.C.C. Rcd. 6867, 6876 ¶ 33 (Rev. Bd. 1987), *recon. dismissed*, 3 F.C.C. Rcd. 826 (Rev. Bd. 1988), *recon. denied* 3 F.C.C. Rcd. 879 (Rev. Bd. 1988), *rev. dismissed* 4 F.C.C. Rcd. 4062 (1989).

2. *Id.* at 6876 ¶ 33.

Review Board responded that it could not declare an act of Congress unconstitutional.[3] While true, that observation was irrelevant to Seven Hills' assertion that the FCC's *interpretation* of section 310(b)(3) violated the First Amendment. Obviously, the agency did possess the power to correct its own interpretation of the statute. The FCC then concluded by quoting the Supreme Court's decision in *Red Lion Broadcasting Co.* v. *FCC* for the proposition that Seven Hills had raised no First Amendment issue whatsoever, for "no one has a First Amendment right to a license."[4]

It is fitting that the FCC's logic in *Seven Hills* rested on *Red Lion*. As a matter of First Amendment law, Seven Hills actually had a strong argument in 1987. By 1995, the argument is compelling. In this chapter, we shall see why.

Courts have historically assigned different levels of protection to speech carried by disparate technologies. The convergence of radio and television broadcasting, cable, telephony, and interactive information services has rendered obsolete the rationales for protecting speech differentially depending on its mode of transmission.[5] We will see that these technological advances also have rendered obsolete the rationales for the disparate protection of alien speech by electronic means.

As chapters 2 and 3 showed, the rationales for the foreign ownership restrictions in section 310(b) of the Communications Act explicitly revolve around restricting alien speech.

3. *Id.* at 6876 ¶ 34 (citing Meredith Corp. *v.* FCC, 809 F.2d 863, 872 (D.C. Cir. 1987); Plano *v.* Baker, 504 F.2d 595 (2d Cir. 1974); Dowen *v.* Warner, 481 F.2d 642 (9th Cir. 1973)).

4. *Id.* at 6876 ¶ 35 (quoting Red Lion Broadcasting Co. *v.* FCC, 395 U.S. 367, 388 (1969)).

5. *See* Thomas G. Krattenmaker & Lucas A. Powe, Jr., *Converging First Amendment Principles for Converging Communications Media*, 104 YALE L.J. 1719 (1995); J. Gregory Sidak, *Telecommunications in Jericho*, 81 CAL. L. REV. 1209 (1993); Note, *The Message in the Medium: The First Amendment on the Information Superhighway*, 107 HARV. L. REV. 1062 (1994).

It was, fundamentally, a concern over the *content* of the messages that aliens might disseminate by electronic means that animated congressional restrictions on foreign ownership or control of American wireless companies. The principal national security goal of the restrictions was to prevent, during wartime, point-to-point wireless communication with the enemy; a second goal was to protect the U.S. from alien propaganda during wartime. These goals, while understandable in times of military conflict, are not necessary or even desirable during times of peace and international cooperation. In such times, the foreign ownership restrictions infringe the First Amendment.

The foreign ownership restrictions can be understood as an anachronism dating from times less hospitable to free expression and foreigners. Following World War I, the Supreme Court upheld numerous restrictions on speech that were designed to protect national security.[6] Such measures had a significant impact on the recent immigrants residing in the U.S. and were rooted at least partly in fear of them. In many instances, the laws of the U.S. have been discovered to pose constitutional problems that were not recognized years before, when such laws were enacted and the Court's case law might have been less developed on a particular subject. Telecommunications is surely one such subject, and it is therefore appropriate now to scrutinize more closely how the foreign ownership restrictions inhibit freedom of speech. We will see that, because they threaten fundamental First Amendment rights under established Supreme Court precedent, the foreign ownership restrictions are probably unconstitutional in at least some familiar circumstances.

6. *See, e.g.*, Schenck *v.* United States, 249 U.S. 47 (1919); Debs *v.* United States, 249 U.S. 211 (1919); Abrams *v.* United States, 250 U.S. 616 (1919); Gitlow *v.* New York, 268 U.S. 625 (1925); Whitney *v.* California, 274 U.S. 357 (1927).

Dimensions of Telecommunications Regulation

Courts and the FCC have made the five following legal distinctions when justifying the regulatory treatment of telecommunications firms: (1) the speaker's right to speak versus the listener's right to hear; (2) wireline transmission versus radio transmission; (3) point-to-point communications versus broadcasting; (4) content-based regulation versus content-neutral regulation; and (5) common carriage versus private carriage. These five categorizations reveal some of the facets of the foreign ownership restrictions and suggest the ways in which these restrictions on speech are overinclusive or underinclusive as a matter of First Amendment jurisprudence.

The Speaker's Rights versus Listener's Rights

Few would dispute that protecting free speech is sacrosanct to American society. America's political and legal traditions rest on the belief that freedom of speech produces better ideas with which to live and to govern society than does regulated speech. By participating in a "marketplace of ideas," citizens will use their critical faculties to select the "best" or "truest" ideas from among diverse competitors. This competition in turn enriches the stock of beneficial ideas available to all of society. As Judge Learned Hand wrote during World War II, the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."[7]

There is a powerful economic corollary to Hand's thesis that emerged at the same point in world history. The great Austrian economist Friedrich Hayek argued that the most profound function of a market economy is not the efficient allocation of scarce resources but the creation and exploitation of knowledge that could not be replicated through the conscious efforts of a central planner for the economy.[8] The protection of speech facilitates the private flows of information that enable markets to produce the spontaneous and decentralized order that Hayek described. As the evidence from corporate finance and other fields of economics attests, as markets become more efficient processors of information, assets become more liquid and more accurately valued. Uncertainty diminishes and wealth is created. Thus, free speech can have ripple effects that benefit the participants in markets far beyond those in which the speech immediately occurs.

Further, free speech is central to America's democratic political system. Free debate informs voters about their own preferences and the proposals of candidates for office, and informs the right to participate in the electoral process. Free speech also has a political "checking" value.[9] To the extent that the press can investigate and publish information concerning misconduct or negligence by government officials, such behavior is more likely to be deterred. On the individual level, free speech helps guarantee a person autonomy and aids him in developing his mental and moral capabilities. Speak-

7. United States *v.* Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).

8. Friedrich A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945). For a succinct summation of Hayek's theories of information and markets written near the end of his long and productive life, see FRIEDRICH A. HAYEK, THE FATAL CONCEIT: THE ERRORS OF SOCIALISM (W.W. Bartley, III, ed., Routledge 1988).

9. *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. BAR FOUND. RESEARCH J. 521 (1977).

ing, listening, reading, and writing are central elements of thinking and making moral judgments. Without those freedoms, a person cannot fully develop as a sentient being. The First Amendment protects this capacity for intellectual maturation.

The First Amendment rights tread upon by the foreign ownership restrictions are of two sorts. The first is the right of the foreigner to speak. Though not citizens, aliens still benefit from the First Amendment's guarantee of freedom of expression.[10] To the extent that the foreign ownership restrictions curtail or prohibit foreigners from speaking, by denying them control and limiting their ownership of electronic media through which ideas may be expressed, the restrictions impinge upon foreigners' First Amendment rights. Throughout the analysis in this chapter it will be useful to repeat the question whether analogous restrictions on the ownership and control of American newspapers could withstand scrutiny under the First Amendment.

The First Amendment also protects the concomitant right to listen to foreigners' speech. Obviously, the right to speak would be useless if the government could ban others from listening. Yet this outcome is precisely the effect of the foreign ownership restrictions. By closing channels of "foreign" speech, the restrictions artificially limit the marketplace from which listeners may select competing ideas.

Wireline Transmission versus Radio Transmission

The method of telecommunications is critical to understanding the rationales and implications of regulation, even if, as a technical matter, the choice of transmission medium does not dictate whether the sender will be transmitting voice, video,

10. *See* Bridges *v.* Wixon, 326 U.S. 135 (1945).

or data. Cable television operators use wires to send video programming; telephone companies use wires to transmit voice and data. Cable television and telephone wires are strung aerially from pole to pole or are buried in underground conduits. The placement of these wires raises regulatory questions of whether these companies use public property—either by digging up streets to lay cable or by using the roads to string it across poles—in a way that justifies regulation to compensate the municipality for the use of public property. If regulation is justified, of course, the question of whether the regulation infringes freedom of speech still remains. We shall return to these questions later in this chapter.

In contrast to telephony and cable television, radio and television stations transmit information by emitting energy at specified frequencies over the electromagnetic spectrum, which the federal government allocates and licenses for use. The supposedly finite nature of the spectrum has given rise to regulation rooted in notions of scarcity and subsidy. As we shall examine at length later in this chapter, scarcity arguments posit that, because the spectrum is a finite public good that government allocates, the government must regulate its use in the public interest. The scarcity argument is untenable, however, because the spectrum is not scarce, nor the consequences of a free market for its allocation apocalyptic, as the proponents of regulation assert. The subsidy argument is that, because the government privileges some citizens by permitting them to use valuable spectrum, government has the concomitant right to regulate that use. Both scarcity and subsidy arguments fail to resolve First Amendment issues satisfactorily.

Finally, there is now a substantial overlap between the once disparate wireline and radio technologies. Telephone companies, for example, are now capable of sending cable television programs to their customers. This development raises the question whether bans on such video programming violate the First Amendment. Further, telephone companies have for years used the spectrum for cellular telephony and long-distance microwave. At least one telephone company has invested in a microwave technology at 28 GHz that may be so spectrally capacious as to offer the consumer the full range of voice, data, and interactive broadband video services.[11] These wireless services of telephone companies may someday raise First Amendment issues as well.

In short, the differentiated technologies of telecommunication have converged in a way that makes irrelevant the pigeonholes for wireless and wireline services that characterize seven decades of federal telecommunications regulation. If the federal government maintains a regulatory apparatus for telecommunications, it must be one that will be adaptable to inevitable scientific breakthroughs. So far, regulation has been slow to respond to progress.

Point-to-Point Communications versus Broadcasting

Whether communication is point-to-point or point-to-multipoint (that is, broadcasting) is probably the dimension of telecommunications regulation that implicates individual liberties to the greatest extent. Point-to-point telecommunication is the sort that occurs through cellular telephone calls, paging, dispatch services, or fixed-link microwave transmissions. As the name suggests, point-to-point telecommunication occurs between a transmitter of voice, video, or data and a specific intended recipient. Broadcasting, on the other hand, is telecommunication that radiates from a central source to potentially millions of consumers within a given area or "service contour." Thus, the term "broadcasting" is used in many countries (including Canada and the U.K.) to include radio, television, and cable television transmissions. In the U.S.,

11. *See, e.g.*, Daniel Pearl, *FCC Resolves Radio-Spectrum Dispute, Giving Big Boost to Wireless Cable TV*, WALL ST. J., July 14, 1995, at B3.

however, cable television is not generally called a form of "broadcasting" because its mass distribution of programming does not rely on an omnipoint radio transmission.

The distinction between point-to-point and broadcasting telecommunication raises obvious First Amendment questions. Should point-to-point communications be free from regulation on the rationale that such speech is simple conversation between individuals? Does the anonymity of the recipient of broadcasting alone justify onerous regulation "in the public interest"? Should broadcasting be regulated differently from the print media, which also disseminate information among the general public? In this chapter, we will not delve into the regulation of point-to-point telecommunications; we will, however, consider whether the public good nature of broadcasting fails to justify much of the regulation that currently purports to protect the public interest, particularly to the extent that parallel regulation of the print media would violate the First Amendment.

Point-to-point delivery networks, broadcasting, and the print media may eventually converge into a general electronic information network. Even now, books and newspapers are digitized on CD-ROMs and are accessible over the Internet and other on-line services. Eventually, the federal government and the courts also will recognize this convergence and adapt current regulations to accommodate it. Otherwise, the law will be overtaken by technology and become irrelevant at best and injurious to consumer welfare at worst.

Content-Based Regulation versus Content-Neutral Regulation

Whether a restriction on speech is content-based or content-neutral determines the level of constitutional scrutiny a court will apply in reviewing the restriction.[12] Content-based laws are ones that discriminate between types of speech on the basis of content or are motivated by the desire to discriminate on that basis. Courts generally apply "strict scrutiny" to content-based laws, and often use this standard of review to strike down such laws. Strict scrutiny requires that a law be justified by a "compelling" state interest and that the law be narrowly tailored to achieve that compelling interest.[13] To survive strict scrutiny, a regulation must be extremely important and effective.

Content-neutral laws may incidentally affect speech but must not discriminate between types of speech nor be rooted in a motivation to discriminate on this basis.[14] Courts apply "intermediate scrutiny" to content-neutral laws. This standard of review is more relaxed than strict scrutiny. To pass intermediate scrutiny, a law must be supported by an "important" or "substantial" state interest and must not "burden substantially more speech than is necessary to further the government's legitimate interests."[15]

The Supreme Court has found content neutrality in some odd places. In *Meese* v. *Keene*,[16] the Court upheld, against a First Amendment challenge, the Foreign Agents Registration Act, which empowered the U.S. Attorney General to classify certain foreign-made films as propaganda and required the producers of these films to label them as such before distribution. Astonishingly, the Court found that "propaganda" was neutral and not a pejorative term at all, characterizing the statute as an innocuous disclosure

12. *See, e.g.*, Turner Broadcasting Sys., Inc. *v*. FCC, 114 S. Ct. 2445 (1994).
13. *See* Widmar *v*. Vincent, 454 U.S. 263 (1981).
14. *Turner Broadcasting*, 114 S. Ct. at 2458–59.
15. United States *v*. O'Brien, 391 U.S. 367 (1968).
16. Meese *v*. Keene, 107 S.Ct. 1862 (1987).

requirement.[17] This decision illustrates the contortions to which the content specific/content neutral distinction is subject.

The restrictions contained in section 310 were an attempt to prevent aliens from transmitting propaganda or other messages inimical to the national interest. It seems outrageous to suggest that a court would consider such a restriction content neutral. Nevertheless the Court has done so before with respect to other statutes. That record makes the outcome of the analysis of section 310 as content neutral or content specific, which we will take up again below, difficult to predict.

Common Carriage versus Private Carriage

The distinction between common carriage and private carriage seems simple enough. Common carriers hold themselves out for use by everyone on a nondiscriminatory basis at reasonable rates.[18] Common carriers exercise no editorial content or control and have limited liability for the messages they transmit. Private carriers are telecommunications firms that do not have these obligations and privileges. Roughly speaking, telephony firms are considered common carriers, whereas cable television operators and radio and television broadcasters are considered private carriers.

The distinction between common carriage and private carriage, however, is not so simple as the preceding discussion suggests, and the limited case law on the subject fails to

17. *See* Rodney A. Smolla & Stephen A. Smith, *Propaganda, Xenophobia, and the First Amendment*, 67 OR. L. REV. 253 (1988).

18. MICHAEL K. KELLOGG, JOHN THORNE & PETER W. HUBER, FEDERAL TELECOMMUNICATIONS LAW 112-13 (Little, Brown & Co. 1992); DANIEL L. BRENNER, LAW AND REGULATION OF COMMON CARRIERS IN THE COMMUNICATIONS INDUSTRY 35-36 (Westview Press 1992).

clarify the matter.[19] Moreover, technological advances are blurring whatever remains of the hoary distinction between common carriers and private carriers. The provision of cable television programs over telephone lines, for example, blurs the distinction because the telephone company will exercise editorial control over which programs to send. Thus, a common carrier will become, at least in part, a non-common carrier—and a speaker, for First Amendment purposes. How this manifestation of convergence will affect telecommunications regulation cannot be known until the Supreme Court rules on the First Amendment status of bans on this technology.

The dichotomy between private and common carriage has important implications for our analysis of the application of section 310, which we will take up again below. One important implication is that a common carrier that challenged the ban might find that the courts are not ready to recognize it as a speaker.

THE CONSTITUTIONAL TREATMENT OF BROADCASTING AND PRINT

We turn now to an examination of how the Supreme Court has applied the First Amendment to various electronic media, starting with radio and television broadcasting. That examination will reveal the intellectual fragility of existing decisions concerning the First Amendment protections afforded electronic speech. As the Court's interpretation of the First Amendment inevitably encompasses the reality of electronic communications, the constitutional infirmity of the foreign ownership

19. National Ass'n of Regulatory Commissioners *v.* FCC, 525 F.2d 380 (D.C. Cir.), *cert. denied,* 425 U.S. 999 (1976); Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Non-Voice, Non-Geostationary Mobile-Satellite Service, Report and Order, CC Dkt. No. 92-76, 8 F.C.C. Rcd. 8450 (1993).

restrictions will become more evident.

The Greater Protection Afforded Print

Print media, particularly newspapers, receive sweeping First Amendment protection from the Supreme Court. In contrast, since the birth of broadcasting, Congress, the FCC, and the courts have refused to extend to this electronic medium the same constitutional protections accorded to the print media. Federal regulation of the broadcast industry has repeatedly entailed direct government control over program content. Congress and the FCC have consistently attempted to impose their notion of proper programming on the broadcast media—television and radio broadcasters. In contrast, print media in the U.S. are generally unregulated. The courts have permitted, and even encouraged, this differential regulation of broadcast speech despite the uncategorical terms of the First Amendment. The dichotomy between print and broadcasting has its roots in the fallacious notion that broadcasting and print media differ in ways that justify their disparate constitutional status.

Prior Restraints. Print media are protected from prior restraints in a way that broadcasters are not. In *Near* v. *Minnesota*, the Supreme Court in 1931 invalidated a Minnesota law that permitted the state's courts to suppress the publication of any "malicious, scandalous or defamatory newspaper."[20] *Near* expanded the definition of "prior restraint" to include cases enjoining an individual from future speech on the basis of past speech.

Near stands in stark contrast to the *Brinkley*[21] and

20. 283 U.S. 697, 706, 722-23 (1931).
21. KFKB Broadcasting *v.* FRC, 47 F.2d 670 (D.C. Cir. 1931).

Shuler[22] cases of the same era. In *Brinkley*, the Federal Radio Commission (the FCC's predecessor) denied renewal of the license of an individual who regularly broadcast radio programs discussing medical problems that listeners described to him by letter. The FRC found the program "inimical to the public health and safety," and thus "not in the public interest."[23] The D.C. Circuit upheld the FRC's action, asserting that the agency "is necessarily called upon to consider the character and quality of the service to be rendered," and that it thus had an undoubted right to look at past performance.[24] The difference, then, between *Near* and the *Brinkley* case is that Minnesota had no such right, while the FRC did.

The result in the *Brinkley* case comports with the *Shuler* case, in which the FRC ordered a radio station off the air because its owner, an evangelist preacher, had broadcast editorials attacking the decadence of Los Angeles city government. The FRC's rationale was that the Reverend Shuler's broadcasts were "sensational rather than instructive."[25] The same could surely be said for the newspaper that the Supreme Court the year before had protected from prior restraint in *Near*, yet the state was forbidden to enjoin even the publication of a single issue—no one even contemplated shutting the paper down. The D.C. Circuit upheld the FRC's action, granting the agency nearly unbridled discretion to consider the character and quality of programming. The court saw no denial of free speech, but "merely the application of the regu-

22. Trinity Methodist Church *v.* FRC, 62 F.2d 850 (D.C. Cir. 1932), *cert. denied*, 288 U.S. 599 (1933). The definitive analysis of these cases, upon which the discussion here relies, is THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING 24–28 (MIT Press & AEI Press 1994), and LUCAS A. POWE., JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT 13–27 (University of California Press 1987).

23. *KFKB Broadcasting*, 47 F.2d at 671.

24. *Id.* at 672.

25. *Trinity Methodist Church*, 62 F.2d at 851.

latory power of Congress in a field within the scope of its legislative power."[26] Thus, the difference between *Near* and the *Shuler* case was that Congress had regulatory control over broadcasting, while Minnesota had no such control over newspapers.

Taxes. Taxes on newspapers and magazines are more likely to be prohibited on First Amendment grounds than are taxes on broadcast media. In *Grosjean* v. *American Press Co.*,[27] the Supreme Court in 1936 invalidated a 2 percent tax on gross receipts from advertising in publications with a certain level of circulation. In *Minneapolis Star & Tribune Co.* v. *Minnesota Commissioner of Revenue*,[28] the Court invalidated a Minnesota tax on the paper and ink used by newspapers. The Court reasoned that the tax singled out the press for special treatment, and that "differential taxation" of the press is unconstitutional because it threatened censorship.[29] Finally, in *Arkansas Writers' Project, Inc.* v. *Ragland*,[30] the Court struck down a sales tax that had an exemption for certain types of magazines. As a result of the exemption, only a few magazines in the state paid sales taxes. The Court invalidated the tax largely for the same reasons enunciated in *Minneapolis Star*—the fear of censorial abuse.

These cases differ markedly from *Leathers* v. *Medlock*,[31] in which the Supreme Court upheld a 4 percent general sales tax that Arkansas had imposed on services including cable television. The tax did not target the media, but did exempt newspapers and magazines from coverage. Despite the ample precedent of *Minneapolis Star*, *Grosjean*, and *Ar-*

26. *Id.*
27. 297 U.S. 233 (1936).
28. 460 U.S. 575 (1983).
29. *Id.* at 585.
30. 481 U.S. 221 (1987).
31. 499 U.S. 439 (1991).

kansas Writers' Project, the Court found that the tax posed little threat of censorship because it singled out neither specific cable operators nor specific ideas.[32] Of course, neither had the taxes challenged in any of the three newspaper cases. Broadcasting was simply a poor relative to print media in the Court's First Amendment jurisprudence.

Right of Reply. Print media are not required to provide a right of reply to those who disagree with their editorial content. In *Miami Herald* v. *Tornillo*,[33] the Supreme Court struck down a Florida law that required newspapers to publish replies of political candidates to articles that attacked their character or performance. The Court reasoned that a right of reply might cause self-censorship among newspapers that wished to avoid the expense of printing replies to their editorials.[34] This incentive, in turn, would contravene the autonomy of newspaper editors, whose protection was paramount under the First Amendment.[35]

In *Red Lion Broadcasting Co.* v. *FCC*,[36] however, the Court upheld an FCC regulation that required radio stations to provide equal time to individuals who were editorially attacked by a program on the air. *Red Lion* posed the same fundamental First Amendment issue that *Tornillo* did: Can the government force a speaker to say what he does not wish to say? The Court said no in *Tornillo*, but yes in *Red Lion*. The First Amendment, said the Court, does not preclude the FCC from requiring a broadcaster "to conduct himself as a proxy or fiduciary with obligations" to implement the "right of the public to receive suitable access to social, political, aesthetic,

32. *Id.* at 446–48.
33. 418 U.S. 241 (1974).
34. *Id.* at 257–58.
35. *Id.* at 258.
36. 395 U.S. 367 (1969).

moral and other ideas and experiences."[37] The Court concluded that the public had a superior right to hear both sides of an issue. "It is the right of the viewers and listeners," the Court announced, "not the right of the broadcasters, which is paramount."[38]

In *Red Lion*, the Court elevated the notion that broadcast licensees had a duty to edify the public over the broadcasters' argument that their new duty would force them to self-censor and destroy their coverage of public issues.[39] The Court rejected this "chilling effect" argument, which had prevailed in *Tornillo*. There would be no such effect, the Court reasoned, because the Government would prevent it: should a timid broadcaster censor itself too severely, the FCC would simply decline to renew its license.[40]

Outright Bans on Content. Newspapers are not subject to outright bans on their content. Broadcasters are. For example, in *FCC* v. *Pacifica Foundation*,[41] the Supreme Court held that the FCC may ban speech from the airwaves that would be legal everywhere else. In *Pacifica*, the speech at issue was George Carlin's "filthy words" monologue. The Court explained that while the material would be permitted elsewhere, "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection."[42] Therefore, censorship of the airwaves was permissible. Though *Pacifica* was eroded by the Court's subsequent decisions that destigmatized indecent material short of actual

37. *Id.* at 389–90.
38. *Id.* at 390.
39. *Id.* at 393.
40. *Id.* at 394–95.
41. 438 U.S. 726 (1978)
42. *Id.* at 748.

obscenity,[43] it remains a fundamental example of the Court's differential treatment of print media and broadcasting.

Rationales for the Differential Treatment

Spectrum Scarcity. Spectrum scarcity has been an underlying premise of nearly all federal regulation of broadcasting. The ostensible purpose of the first significant radio regulation in the U.S. was to minimize interference between rival radio broadcasters in the early 1920s who lacked a system of enforceable property rights in the electromagnetic spectrum. However, rather than permit private ownership of the spectrum, Congress enacted legislation in 1927 to nationalize the spectrum and license its use.[44] Recent research by economist Thomas Hazlett, however, has shown that Congress fully understood in 1927 that a system of property rights in the broadcast spectrum was feasible and was already beginning to evolve through common law adjudication in state court in Illinois.[45] Congress chose, however, to allocate spectrum through a political process rather than through markets, and it restricted competition by limiting the supply of frequencies available for AM radio broadcasting below the level then technically feasible.[46]

The Federal Radio Commission, which became the FCC in 1934, erected an elaborate zoning system for the spectrum. By the early 1940s, though, the federal government's principal justification for regulating broadcasting

43. *See* Cohen *v.* California, 403 U.S. 15 (1971); Hustler Magazine *v.* Falwell, 485 U.S. 46 (1988); Sable Communications of Cal., Inc. *v.* FCC, 492 U.S. 115 (1989).

44. Radio Act of 1927, ch. 169, 44 Stat. 1162 (1927), *repealed by* Communications Act of 1934, ch. 652, 602(a), 48 Stat. 1102 (current version at 47 U.S.C. §§ 151-613).

45. *See* Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J.L. & ECON. 133, 158-63 (1990).

46. *Id.* at 152-58.

had shifted away from preventing interference. The FCC and the Supreme Court, led by Justice Felix Frankfurter, maintained that the spectrum was finite and that the agency had to regulate the structure of the communications industry in order to prevent a monopoly in the marketplace of ideas.[47]

"Diversity of Expression." Today, promoting efficient spectrum use and preventing interference are a very small part of the FCC's agenda. Instead, the FCC has become a forum for rent-seeking under the guise of promoting "diversity of expression." With respect to the creeping regulation of cable television during the 1960s, for example, the FCC construed its jurisdiction broadly to reach unregulated firms enabled by new technologies to compete with the agency's existing clientele.[48]

In 1990, the Supreme Court held in *Metro Broadcasting, Inc.* v. *FCC*[49] that the FCC did not violate the Equal Protection Clause of the Fourteenth Amendment by using racial preferences when awarding licenses to operate radio and television stations. Apart from its significance as an affirmative action decision, which is minimal after the Court's 1995 decision in *Adarand Constructors, Inc.* v. *Pena*,[50] *Metro Broadcasting* was important for a reason that escaped notice: It indicated that the Court and the FCC as of 1990 were willing to continue using specious scientific and economic arguments to justify denying the electronic media the full

47. The transformation began with Justice Frankfurter's opinion in FCC *v.* Pottsville Broadcasting Co., 309 U.S. 134, 137 (1940), and was complete with his opinion in National Broadcasting Co. *v.* United States, 319 U.S. 190, 215–17 (1943) *(NBC)*. *See also* Associated Press *v.* United States, 326 U.S. 1, 20 (1945) (Black, J.); FCC *v.* Sanders Bros. Radio Station, 309 U.S. 470, 474 (1940) (Roberts, J.).

48. *See* KELLOGG, THORNE & HUBER, *supra* note 18, at 86, 695–96.

49. 497 U.S. 547, 579–601 (1990). *See* Neal Devins, Metro Broadcasting, Inc. *v.* FCC: *Requiem for a Heavyweight*, 69 TEX. L. REV. 125 (1990).

50. 63 U.S.L.W 4523 (1995).